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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Williamsburg County
The Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

Respondent,

v.

RONALD HAKEEM MACK,

Petitioner.

Appellate Case No. 2020-001101

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Did the Court of Appeals err by expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, through its misinterpretation of this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding?

STATEMENT OF THE CASE

Petitioner, Ronald Hakeem Mack, was sentenced to fifty years imprisonment for murder and a concurrent thirty years for first-degree burglary following a guilty plea on August 24, 2010.[1] (R., p. 1; p. 32, lines 7-14). Petitioner admitted he and three co-defendants drove to the home of Kenyon Dorsey (hereinafter "Victim"), wherein they shot and killed him over a drug money debt owed to the gang to which they belonged. (R., p. 7, lines 22-25; p. 8, lines 1-3; p.8, line 8 through p.12, line 20; p. 16, line 15 through p.17, line 13). Petitioner was seventeen-years-old at the time.[2] (R., p. 19, lines 4-5). Petitioner pled guilty before the Honorable Clifton Newman and was represented by attorney LeGrand Carraway. (R., p. 1). Petitioner did not appeal his guilty plea or sentences.

On August 5, 2011, Petitioner filed for post-conviction relief. (2011-CP-45-383). After an evidentiary hearing, the Honorable R. Ferrell Cothran, Jr. denied and dismissed with prejudice the application. On April 1, 2015, Petitioner filed a petition for writ of certiorari which presented, among other issues, the claim that his case should be remanded for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). This Court denied certiorari on March 25, 2016. (Appellate Case No. 2014-001518).

On April 20, 2015, Petitioner filed a motion for resentencing pursuant to *Aiken*. (R., p. 39-41). The State submitted a response to the motion on April 28, 2015, and Petitioner replied on May 15, 2015. (R., p. 61-71). This Court vested the Honorable Michael G. Nettles with exclusive jurisdiction over the case on August 11, 2016. (R., p. 82).

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[1] As part of the negotiations the State dropped the criminal conspiracy and weapons charges. (R., p. 3, lines 15-19).

[2] Petitioner was four months away from his eighteenth birthday. (R., p. 34-36).

The State moved to dismiss the motion for resentencing on October 5, 2016, arguing Petitioner was not entitled to relief because he was not sentenced to life without parole. He received a term of fifty years and the plea judge considered all relevant information prior to sentencing. (R., p. 85-87). Petitioner opposed the motion, asserting the term-of-years sentence he received was the functional equivalent of a life sentence such that he was part of the class entitled to resentencing. (R., p. 88-107).

On February 17, 2017, a hearing was held on the State's motion before Judge Nettles. (R., p. 117). Petitioner was represented by attorney Laura R. Baer, and the State was represented by Solicitor Ernest A. Finney, III. (R., p. 117). By order dated June 14, 2017, Judge Nettles denied the State's motion to dismiss, and made substantive findings that 1) *Aiken* applied to *de facto* life sentences, 2) fifty years constituted such a sentence, and 3) the original sentencing hearing was insufficient under the new precedent set forth by *Aiken* and *Miller*. (R., p. 392-400). Accordingly, the judge found Petitioner was entitled to a resentencing hearing under *Aiken*. (R., p. 401). Pursuant to the Supreme Court's grant of exclusive jurisdiction, Judge Nettles' Order also dictated that he would preside over the new sentencing hearing and that a status conference would be convened within fifteen days of the Order, so as to schedule such a proceeding. (R., p. 401).

The State filed a motion to reconsider and Petitioner opposed the motion. (R., p. 402-405). The State filed a lengthy memorandum in support of its motion. (R., p. 406-434). Judge Nettles denied the motion for reconsideration by order dated November 15, 2017. (R., p. 435).

The State served a notice of appeal on November 22, 2017. Mr. Mack, as Respondent in the appeal, filed a motion to dismiss the appeal as interlocutory on December 19, 2017, which the State opposed. The Court of Appeals denied the motion to dismiss by order dated February 1, 2018. Mr. Mack submitted his Final Brief of Respondent on October 29, 2018. The State submitted

its Final Brief of Appellant and its Final Reply Brief on November 13, 2018. The South Carolina Court of Appeals filed its unpublished Opinion, 2020-UP-148, on May 20, 2020, and reversed the decision of the circuit court. Petitioner filed a Petition for Rehearing on June 4, 2020, which the Court of Appeals denied on July 14, 2020.

On August 12, 2020, Petitioner filed his Petition for Writ of Certiorari to the Court of Appeals. He sought certiorari on two issues:

I. Did the Court of Appeals err by expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, through its misinterpretation of this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding?

II. Did the Court of Appeals err by reversing the circuit court's finding that Petitioner was entitled to an individualized sentencing hearing where his fifty-year sentence for murder committed as a juvenile constitutes a de facto life sentence in violation of the federal and state constitutions?

The State filed its Return to the Petition on September 18, 2020. On August 6, 2021, this Court granted certiorari as to the first issue presented. This Brief of Respondent now follows:

STATEMENT OF FACTS

The Crime

Petitioner was involved in the Bloods gang along with Victim. The two individuals were involved in the sale of drugs together for the gang and developed a friendship. That friendship deteriorated as Victim became indebted to the gang for $78,000. The gang's leadership gave Petitioner instruction to "take care of the problem." (R., p. 17-18). In response, Petitioner called his mother, Tawanda Allen, as well as her boyfriend, Kelvin Bowen, and asked that they assist him with murdering Victim. He instructed them to bring guns and drive down from Maryland. (R., p. 10, lines 7-14). Petitioner also asked for help from a fellow gang member, Antonio McClary.

On April 5, 2009, Allen and Bowen picked up Petitioner and McClary, and the group

proceeded to drive to Victim's home. Petitioner was four months away from turning eighteen when he and his co-defendants broke into the home of seventeen-year-old Kenyon Dorsey. (R., p. 8, lines 18-23; p. 34-36). Petitioner found Victim sleeping in the recliner. He proceeded to walk behind the recliner and shoot Victim three times. Shortly after, co-defendant Bowen saw Victim move and stated, "He's not dead, we need to finish him off." He then shot Victim once with a shotgun. The co-defendants then got in the car and drove away. Victim's mother was inside the home at the time. She heard what she thought were firecrackers. When she entered the room she saw blood on the wall and realized her son had been murdered. (R., p .8, line 23 through p. 11, line 15).

Petitioner, Allen, and Bowen were found in Maryland and ultimately all four participants were arrested. Petitioner, Allen, and McClary gave statements to police. Petitioner admitted that he and three co-defendants drove to Victim's home and killed him over a drug money debt owed to the gang to which they belonged. (R., p. 7, lines 22-25; p. 8, lines 1-3; p. 8, line 8 through p.12, line 20; p. 16, line 15 through p.17, line 13). On August 24, 2010, Petitioner entered a guilty plea to the charge of murder, and after extensive argument in mitigation, the Honorable Clifton Newman sentenced Petitioner to imprisonment for fifty years for the charge of murder and a concurrent thirty years imprisonment for first degree burglary. (R., p. 1; p. 7-12; p. 16, line 15 through p.17, line 13; p. 30, line 16 through p. 32, line 14; p. 34-36).

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). Questions of law are reviewed *de novo*, with no deference to the trial court. *Smalls v. State*, 422

S.C. 174, 181, 810 S.E.2d 836, 839 (2018). Questions of statutory interpretation are questions of law subject to *de novo* review. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

ARGUMENTS

I. The Court of Appeals was correct to find this matter immediately appealable, as it is a post-judgment request for new sentencing. However, even under the constructs of interlocutory appellate review, this matter would satisfy two of the permissible exceptions set forth in § 14-3-330.

This case is a post-judgment matter. Petitioner's existing conviction and sentence were reached on indisputably sound law. As such, it does not fall within the normal confines of an "interlocutory appeal", but is instead an appeal challenging the erroneous final ruling on an issue that, if unchallenged, would effectively vacate the State's final judgment and award relief in the form of a new sentencing hearing. The Court of Appeals was correct to find no merit to the argument that the issue was not immediately appealable. Moreover, the Court of Appeals was correct to equate its position to that reached by this Court in *State v. Johnson*, 376 S.C. 8, 10-11, 654 S.E.2d 835, 836 (2007), such that an award of an entirely new legal proceeding is immediately appealable when based upon an error of law. Nevertheless, to the extent the State's appeal in this matter could be considered interlocutory, it satisfies the immediate appealability exceptions set forth in both S.C. Code Ann. § 14-3-330(2)(b) and § 14-3-330(3). There is therefore no basis to find the State's appeal impermissible.

a) The State's appeal was not interlocutory in nature.

An interlocutory appeal arises when a decision of the trial court is raised on appeal *prior to the establishment of a final judgment. Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005) ("The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14–3–330 (1976 & Supp.2003)."); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) ("Whether based on statute or case

law, the overarching point remains – absent the presence of an exception to the final judgment rule, appealability is determined by a final judgement and an aggrieved party."). *In this case, we have a final judgment*, and the only intrusion to that judgment is an order predicated entirely on an error of law. It is manifest that a final judgment exists because Petitioner's desired relief is to see that final judgment vacated in favor of resentencing. As such, the posture of this case places it in an entirely different context from which most all interlocutory appeals are evaluated, and it renders the various cases relied upon by Petitioner simply inapplicable to the matter at hand. This is not an interlocutory appeal seeking review *before* a final judgment is rendered, it is an appeal of an erroneous proceeding that would undo an existing final judgment *after* such was rendered more than a decade ago.

As the case is not interlocutory for lack of a final judgment, Petitioner instead argues that the interlocutory nature of the appeal arises from the fact that Judge Nettles had not yet sentenced Petitioner under *Aiken*. However, *Aiken* applies to a definitive class of individuals – juveniles who received LWOP sentences. *Id.* 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). Considering the purpose and directive given by this Court in *Aiken v. Byars*, there is no contemplation of hearings to determine a defendant's qualification in extension of existing precedent. As a result, Petitioner's reliance upon the Judge Nettle's decision as being merely interlocutory to his actual resentencing lacks merit. Petitioner's position is mistaken because it classifies "a new sentence" as the contemplated relief under *Aiken*. That is a misconstruction of *Aiken*, as this Court allowed (to the restricted class) only the opportunity to be sentenced to less than life. There is no guarantee to a sentence less than life without parole. Of course, Petitioner already has a "less than life" sentence, demonstrating the precise reason *Aiken* does not apply.

As the nature of the Order was responsive to the State's motion to dismiss for lack of basis

to apply *Aiken*, Judge Nettle's ruling on that issue was final, in error, and appealable. The State has every right to protect the finality of its properly rendered judgments. As was set forth on this very issue by the Supreme Court in *Montgomery*, a State has "weighty interests in ensuring the finality of its convictions and sentences", but that interest is still subject to circumstances where that finality is deemed to be constitutionally improper. *Montgomery v. Louisiana*, 577 U.S. 190, 205, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016). Where finality of the judgment *is constitutionally proper*, the right to seek an appeal to protect that finality should also be proper.

b) If categorized as an interlocutory appeal, the appeal is permissible under the exceptions set forth in S.C. Code Ann. § 14-3-330(2)(b) and § 14-3-330(3).

If the State's appeal is considered interlocutory, it is not impermissible as it satisfies two separate exceptions set forth in S.C. Code Ann. § 14-3-330. The circumstances of the State's appeal satisfy § 14-3-330(2)(b) which permits an appeal of an order affecting substantial rights of the parties when the order grants or refuses a new trial. Though the Court of Appeals did not give reference to the statute, and felt the issue required no more than a footnoted mention, this is essentially the holding reached by the Court of Appeals' unpublished opinion relying upon *Johnson*. As an additional sustaining ground, the appeal satisfies § 14-3-330(3) which permits an immediate appeal of a "final order affecting a substantial right made in any special proceeding or upon summary application in any action after judgment." As such, the Court of Appeals' opinion should not be reversed as having decided an impermissible interlocutory appeal.

South Carolina Code Ann. § 14-3-330(2)(b) asserts that "the Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n order affecting a substantial right made in an action when such order . . . grants or refuses a new trial". S.C. Code Ann. § 14-3-330(2)(b). This statutory language, in conjunction with the

actions taken by this Court in *Johnson*, demonstrates that subsection (2)(b) is applicable to permit an immediate appeal of Judge Nettles' Order.

A trial always consists of two separate parts: a guilt phase and a penalty phase.[3] This Court held that even in the absence of a final judgment, the state can immediately appeal the award of a new trial when the ruling is based entirely upon an error of law. *State v. Johnson*, 376 S.C. 8, 654 S.E.2d 835 (2007). In effect, the ruling demonstrates that the State need not wait to complete the new trial before appealing its underlying impropriety. The Court of Appeals was correct to equate this case to *Johnson*, as it correspondingly permits the right to appeal a new penalty phase of trial when granted on an error of law.

Such a ruling in *Johnson*, as applied by the Court of Appeals here, is the practical application of § 14-3-330(2). Judge Nettles' Order "affect[ed] a substantial right made in an action when such order . . . grants or refused a new trial". S.C. Code Ann. § 14-3-330(2)(b).[4] In *Johnson*, the appeal was granted without first obtaining a sentence. Here, the appeal was granted in absence of trial because Appellant pled guilty to the charge. Regardless, they both granted an immediate appeal in advance of redoing the afflicted portion of the trial in question. As such, Judge Nettle's Order was immediately appealable.

South Carolina Code Ann. § 14-3-330(3) sets forth that the Supreme Court has appellate jurisdiction to corrects errors of law and review upon appeal "[a] final order affecting a substantial

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[3] These distinctive parts to a trial are even more so apparent for the issues presented in the case at hand, given that this Court specifically contemplated the extensive mitigation evidence that would be presented when an *Aiken v. Byars* hearing is properly conducted. *Id.* 410 S.C. at 545, 765 S.E.2d at 577.

[4] The nature of this matter, combined with its procedural posture, renders it strikingly similar to a collateral action challenging the constitutionality of an inmate's sentence. Though there are jurisdictional differences in play, the award of collateral relief in the form of a new trial or new sentencing hearing that undoes the existing final judgment is never *received* by the applicant before the parties are given an opportunity to appeal that relief on the basis of legal error.

right made in any special proceeding or upon a summary application in any action after judgment." S.C. Code Ann. § 14-3-330(3). This appeal could not better fit the language of the statute and is analogous to the existing case law referencing the utility of §14-3-330(3). This Court granted exclusive jurisdiction to Judge Nettles on Petitioner's motion, thereby constituting a special proceeding outside the normal avenues of litigation. Likewise, the action arises out of Petitioner's "application" to be included in a classification of juvenile inmates contemplated by *Aiken* long after judgment was rendered in his case. As Judge Nettles issued a final order on the applicability of "de facto" life sentences under *Aiken* and *Miller* in a special proceeding subsequent to judgment, the nature of this appeal could not better fit the descriptive language of the statute.

Likewise, §14-3-330(3) contemplates the conduct of a *post-judgment hearing* on a legal matter, and this Court has recognized the application of this statute as means of appellate review for such a hearing. *Cf. State v. Jones*, 293 S.C. 54, 58, 358 S.E.2d 701, 703-04 (1987), abrogated by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), and holding modified by *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (setting forth by footnote that the results of a post-judgment *Batson* hearing could be appealed as a special proceeding under §14-3-330(3)). Accordingly, §14-3-330(3) provides a means of immediate appealability for the State in this post-judgment matter.

CONCLUSION

The circumstances of this case are more than unusual, as they result from Judge Nettle's legal error awarding Appellant the status of an aggrieved juvenile and granting him relief in the form of an *Aiken v. Byars* resentencing. Such circumstances do not constitute the interlocutory conditions that Appellant believes exist to avoid the State's immediate right to appeal. Such is an artificial interlocutor status created by mischaracterizing the process that led to the appeal. *Aiken*

does not contemplate qualification hearings for "de facto" life sentences and therefore such a proceeding cannot be deemed a part of the *Aiken v. Byars* remedy for purposes of skirting appellate review while the State's original judgment is still intact. In any case, evaluating this matter under the parameters of permissible interlocutory appeals demonstrates that this appeal would satisfy both the grant of a new trial and the special proceedings exceptions set forth under § 14-3-330. The matter is an intriguing one, but all lines of reasoning lead to the conclusion that the State's appeal of Judge Nettles' Order was properly before the Court of Appeals for consideration.

Respectfully submitted,

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